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No. 88-770

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

THE PULITZER PUBLISHING COMPANY and MARIANNA RILEY,
Petitioners,

vs.

THE HONORABLE LESTER W. DUGGAN,
Circuit Judge for the Circuit Court of St. Charles County,
Respondent.

On Petition for Writ of Certiorari
to the Supreme Court of Missouri

BRIEF IN RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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COUNTERSTATEMENT TO QUESTION PRESENTED

Does a judge in a grand jury proceeding have the discretion to refuse disclosure of the grand jurors' names and addresses after balancing the safety and welfare of the grand jurors' with the public's right to access?

TABLE OF CONTENTS

	Page
Counterstatement to Question Presented	i
Table of Contents	iii
Table of Authorities	iv
Introduction	1
Reasons for Denying the Writ	3
Conclusion	5
Appendix:	
Order of Judge Duggan Dated June 21, 1988	A-1
Order of Judge Duggan Dated June 30, 1988	A-2

TABLE OF AUTHORITIES

Page

Cases:

Douglas Oil Co. v. Petrol Stops Northeast, 441 U.S. 211 (1979) 2

Press Enterprise Co. v. Superior Court, 478 U.S. 1 (1986) 2

State of Missouri ex rel. Garret v. Saitz, 594 S.W. 2d 606 (Mo. banc 1980) 3

U.S. v. Scarfo, 850 F.2d 1015 (3rd Cir. 1988) 5

Statutes:

Mo. Rev. Stat. §540.010 - .330 (1986) 1,3

Mo. Rev. Stat. §610.010 - .120 (1986) 3

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INTRODUCTION

Missouri's Constitution and Revised Statutes mandate that grand jury proceedings are closed. The entire tone of petitioner's argument implies that the grand jury process was employed as a "grand plan" to conceal the names and addresses of the jurors from the public. Such implications are neither fair nor accurate.

Petitioners' quaint historical arguments are irrelevant in today's complex society and bear little on the question presented. Grand jury proceedings are, by statute (Mo. Rev. Stat. §§540.010-.330), closed to the public and press.

Dictum from *Press Enterprise Co. v. Superior Court,* 478 U.S. 1 (1986) (Press-Enterprises II), a trial proceeding, states "although many governmental processes operate best under public scrutiny, it takes little imagination to recognize that there are some kinds of government operations that would be totally frustrated if conducted openly. A classic example is that the proper functioning of our grand jury system depends upon the secrecy of grand jury proceedings. *Douglas Oil Co. v. Petrol Stops Northwest,* 441 U.S. 211, (1979)."

REASONS FOR DENYING THE WRIT

PETITIONER LACKS STANDING TO CHALLENGE THE JURORS

Mo. Rev. Stat. §§540.060 and 540.070 state that defendants may challenge the array before the grand jurors are sworn. At that time, the court would rule on such challenges. Compliance with the law as to procedures in the selection process or composition of the grand jury is properly done by the courts. The grand jurors' names do not have to be divulged in order to review the make-up of the grand jury.

A unanimous Missouri Supreme Court limited a writ of mandamus to general demographic information where a criminal defendant/relator, similarly charged with murder, demanded jurors names and addresses from a master grand jury list. The court noted that "providing criminal defendants with a wide range of information . . . would generate an unnecessary imposition on the citizens of this state". *State of Missouri ex rel. Garret v. Saitz*, 594 S.W. 2d 606, 608 (Mo. banc 1980).

There is no similar statutory provision allowing anyone, other than those answering to criminal charges, to make challenges. Further, and as petitioners indicate, there is no provision requiring the names, as selected by the Sheriff, (Mo. Rev. Stat. §540.020) to become public record (Petition, p. 3). Thus even under Mo. Rev. Stat. §610.010 - .120 ("Sunshine Law") petitioners lack standing since the information requested is not automatically a public record. Further, even if the names and addresses should be spread upon the county records, the Court in its discretion, could seal that portion with a protective order.

NO RIGHT OF ACCESS

Lester Duggan, Circuit Judge for the Circuit Court, responded to inquiries from the petitioners requesting access to the names and addresses by stating disclosure was inappropriate

and by issuing the following orders (Exhibits A and B). Both orders specify that the names are not being released in that "the court finds the interest in the safety and welfare of the members of the grand jury outweighs any right of the public if any to have such information." (Exhibit A; see also Exhibit B).

Petitioners indicate that the grand jury system has not been utilized in St. Charles County since 1978 (Petition p. 3). Although the names of the grand jurors were published at that time, the nature of that term and the recent 1988 term were widely disparate. The 1978 grand jury was convened to investigate the purchase and renovation of a building. The 1988 grand jury was convened for the single purpose of investigating a highly publicized, gruesome double homicide. Clearly, public policy dictates that jurors investigating a double homicide would reasonably require a greater level of protection to deliberate and freedom from possible reprisals or pressure by the public or any individual than a grand jury investigating a building purchase.

Further, since the proceedings are closed, Judge Duggan, after considering the testimony and circumstances of the grand jury investigation is the only party able to accurately balance the jurors' safety interests against the public's interest in access to those names.

NO PRESUMPTION OF OPENNESS

Petitioners urge that the court must articulate specific findings to limit public access (Petition, p. 11). To require specific articulation would necessitate disclosure of some aspect of statutorily closed proceedings. Further, cases cited by petitioners were open trial proceedings and reflected decisions on guilt or innocence. Closed grand juries proceedings, in contrast, are not subject to the same rigid procedural safeguards, since jurors determine only whether or not probable cause exists.

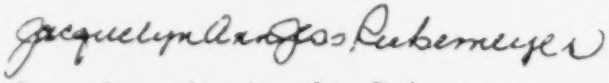
While not controlling, a recent United States Court of Appeals decision, *U.S. v. Scarfo,* 850 F.2d 1015, 1023 (3rd Cir. 1988) in reviewing trial proceedings, stated:

> . . . Because the jury system contemplates that jurors will inconspicuously fade back into the community once their tenure is completed, anonymity would seem entirely consistent with, rather than anathema to, the jury system. In short, we believe the probable merits of the anonymous jury system are worthy not of a presumption of irregularity, but of disinterested appraisal by the courts.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,



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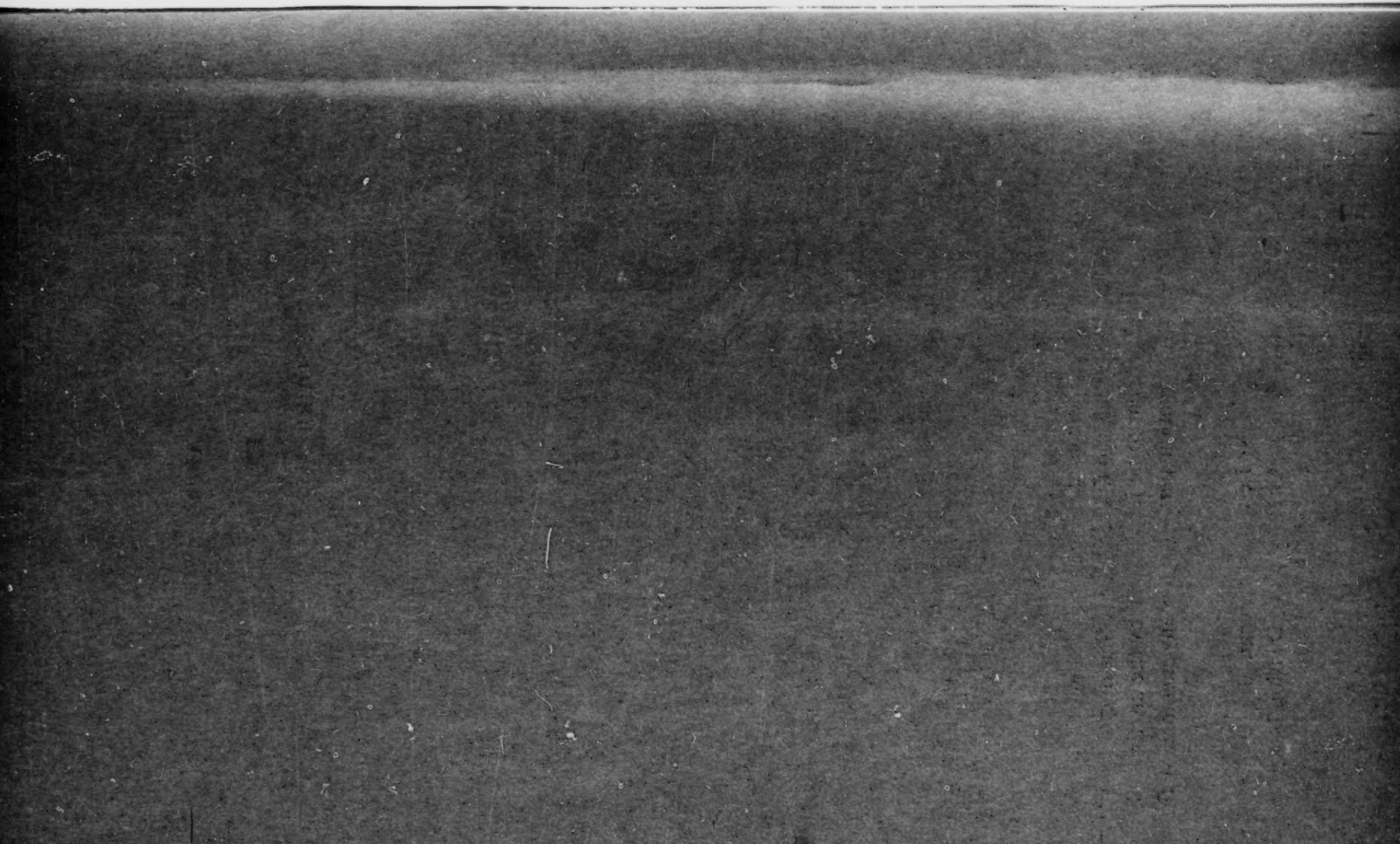
Dated: December 1, 1988

APPENDIX



APPENDIX

EXHIBIT A

STATE OF MISSOURI)
) SS.
COUNTY OF ST. CHARLES)

IN THE CIRCUIT COURT OF
ST. CHARLES COUNTY, MISSOURI
CIRCUIT JUDGE DIVISION

IN THE MATTER OF:

GRAND JURY
APRIL TERM, 1988

ORDER PROHIBITING DISCLOSURE OF IDENTIFYING INFORMATION PERTAINING TO GRAND JURY

In the interest of the safety and welfare of the Grand Jury and each member thereof, it is hereby ordered that the names and/or the addresses and any other identifying information with respect to them except that each is a resident of a different township of the County shall be closed records and not available to the public.

The Court finds that the interest in the safety and welfare of the members of the Grand Jury outweighs any right of the public if any to have such information. Further, said Grand Jurors and each of them are bound by law and their respective oaths to maintain confidence and secrecy of certain matters that come to their knowledge and the security of that duty may well be jeopardized or appear to be jeopardized by the disclosure of any identifying information pertaining to any member of the Grand Jury.

/s/ Lester W. Duggan, Jr.
Circuit Judge, Division No. 1

Dated:
June 31, 1988

EXHIBIT B

STATE OF MISSOURI)
) SS.
COUNTY OF ST. CHARLES)

IN THE CIRCUIT COURT OF
ST. CHARLES COUNTY, MISSOURI
CIRCUIT JUDGE DIVISION

IN THE MATTER OF:

GRAND JURY
APRIL TERM, 1988

ORDER PROHIBITING DISCLOSURE OF IDENTIFYING INFORMATION PERTAINING TO GRAND JURY

In the interest of the safety of the venire panel from which the Grand Jury was selected and each member thereof, it is hereby ordered that the names and/or the addresses and any other identifying information with respect to them, except that the panel was selected at random and as equally as possible from the various townships of the County, shall be closed records and not available to the public.

The Court finds that the interest in the safety and welfare of the members of the Grand Jury panel outweighs any right of the public if any to have such information. Further, said Grand Jurors and each of them are bound by law and their respective oaths to maintain confidence and secrecy of certain matters that come to their knowledge and the security of that duty may well be jeopardized or appear to be jeopardized by the disclosure of any identifying information pertaining to any member of the Grand Jury.

/s/ Lester W. Duggan, Jr.
Circuit Judge, Division No. 1

Dated:
June 30, 1988